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U.S. Citizenship
and Immigration
Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: **MAY 12 2008**

IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology consulting and software development firm. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the job offered did not require a member of the professions. The director also determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, the petitioner asserts that the position being offered, programmer/analyst, has complex duties such that the position requires a baccalaureate plus five years of experience. The petitioner further asserts that the balances in its bank account in 2005 and the new financial documentation for 2006 demonstrate its ability to pay the proffered wage. While we withdraw the director's finding that the job did not require a *member of the professions* holding an advanced degree, we uphold the director's finding that the petitioner has not demonstrated its ability to pay the proffered wage as of the priority date in this matter.

Finally, beyond the decision of the director, we find that the job being offered in this proceeding is not the position certified by the Department of Labor. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The Job Requirements

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b) of the Act states in pertinent part that:

- (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

(i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.**

(Bold emphasis added.)

We note that the beneficiary in this matter has a four-year Bachelor of Engineering and five years of post-baccalaureate experience. At issue is whether the job requires a member of the professions and whether the beneficiary is a member of that profession. The key to determining the job qualifications is found on the Form ETA 750, block 14. This section of the application for alien labor certification describes the terms and conditions of the job offered. It is important that the Form ETA 750 be read as a whole.

The job title listed on the Form ETA 750, block 9, is "software engineer." In this matter, block 14 reflects that *four years of college resulting in a bachelor's or Master's degree* is required. No particular field of study is required. Five years of experience in the job offered or a related occupation is also required.

As defined at Section 101(a)(32) of the Act, profession "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The regulation at 8 C.F.R. § 204.5(k)(2), in pertinent part, defines "profession" as follows:

[O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a *United States baccalaureate degree or its foreign equivalent* is the minimum requirement for entry into the occupation.

The director acknowledged these definitions, but then relied on *Matter of Shin*, 11 I&N Dec. 686 (Dist. Dir. 1966) and *Matter of Palanky*, 12 I&N Dec. 66 (Regl. Commr. 1966), for the proposition that the degree must be related to the field. We note that in *Matter of Shin*, 11 I&N Dec. at 688, the District Director did state that a degree in and of itself was insufficient; rather, the “knowledge acquired must also be of [a] nature that is a realistic prerequisite to entry into the particular field of endeavor.” The following discussion, however, was limited to the level of education required, not the major field of study. Moreover, *Matter of Palanky*, 12 I&N Dec. at 68, addressed an occupation that did not require a full baccalaureate. Most significantly, these cases predate the regulation at 8 C.F.R. § 204.5(k)(2). Therefore, we must defer to the definition in that regulation, which states only that a profession must require a baccalaureate for entry into the occupation.

Our interpretation of the regulation is bolstered by the statutory definition of professionals, which includes teachers in elementary schools. According to the Department of Labor’s Occupational Outlook Handbook, available on the Bureau of Labor Statistic’s website at www.bls.gov, an elementary school teacher must have a bachelor’s degree but not necessarily in a particular field.

We emphasize, however, that in considering whether the job requires a member of the professions or whether the beneficiary is a member of that profession, we rely on our own definition of “profession” at 8 C.F.R. § 204.5(k)(2). This definition is used by CIS in determining whether an alien is qualified for the classification sought in this matter, a determination that is solely under CIS jurisdiction. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983). In other words, DOL certification does not bind us in determinations of eligibility for a visa classification. Moreover, the regulation provides that a profession is an occupation for which a United States baccalaureate degree or its foreign equivalent is the *minimum* requirement for *entry* into the occupation. Thus, some professions may require *more* than a baccalaureate in an unspecified field for *entry* into that particular profession. In such cases, the director would be justified in considering, independent of whether the alien meets the job requirements certified by DOL and is a member of some other profession, whether the alien can truly be considered a member of the profession associated with the occupation certified by DOL. We note that being a member of the professions does not entitle the alien to classification as a professional if he does not seek to continue working in that profession. See *Matter of Shah*, 17 I&N Dec. 244, 246-47 (Regl. Commr. 1977).

The job certified by DOL in this matter, software engineer, requires a bachelor’s degree and the director did not reference a source of information suggesting that a minimum of a baccalaureate was not a normal requirement for the occupation. The Occupational Outlook Handbook (OOH) published by DOL is a primary source of information as to the normal minimum requirements for an occupation. In this matter, the OOH 112 (2006-07 ed.) states:

Most employers prefer to hire persons who have at least a bachelor’s degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual degree concentration for applications software engineers is computer science or software engineering; for systems software engineers, it is

computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs.

* * *

For systems software engineering jobs that require workers who have a college degree, a bachelor's degree in computer science or computer information systems is typical. For systems engineering jobs that place less emphasis on workers having a computer related degree, computer training programs leading to certification are offered by systems software vendors.

This language reveals that while a bachelor's degree in computer science or computer information systems is "typical," a degree in that field is not required for entry into the profession. Ultimately, the typical requirement for the proffered position is "at least a bachelor's degree," although a specific field of study is not always necessary.¹ In light of the above, we are satisfied that the position certified by DOL is a profession.

While the position certified by DOL is a profession, the Form I-140, Part 6 indicates that the petitioner is now offering the beneficiary a different position. The job title listed on the Form ETA 750, block 9, is "Software Engineer." Upon review of the job description in block 13 and the educational requirements in block 14, DOL certified the position with the occupation title "Software Engineer," and Occupational Code "030-062-010." We note that, at the time the Form ETA 750 was filed, the Dictionary of Occupational Titles (DOT) code for programmer/analysts was 030-162-014.

On the Form I-140, Part 6, the petitioner listed the job title for the proposed employment as "programmer/analyst." The "SOC" code listed in 15-1021, the O*NET code for programmer/analysts. We note that the O*NET codes for software engineers are 15-1031.00 and 15-1032.00.

The regulation at 20 C.F.R. § 656.30(c)(2), as in effect when the Form ETA 750 in this matter was filed, provides that an alien employment certification for a specific job offer "is valid only for the particular job opportunity." Thus, the Form ETA 750 in this matter is not valid for the job listed on the Form I-140 petition before us.

Ability to Pay the Proffered Wage

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability

¹ The O*NET data for software engineers, available at <http://online.onetcenter.org/link/summary/15-1031.00>, reveals that 85 percent of software engineers hold baccalaureate degrees.

to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 30, 2004. The proffered wage as stated on the Form ETA 750 is \$38.68 per hour, which amounts to \$80,454.40 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have an establishment date in 1997, a gross annual income of approximately \$4,000,000, an undisclosed net income and 25 employees. In support of the petition, the petitioner submitted a bank letter listing the petitioner's monthly balances from January 2005 through March 2007.

The petitioner also submitted its Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns for the petitioner for the years 2004 and 2005. The tax returns reflect the following information for the following years:

	2004	2005
Net income	\$23,427	\$7,356
Current Assets	\$75,718	\$71,851
Current Liabilities	\$168,610	\$4,326
Net current assets	(\$92,892)	\$67,525

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, the petitioner resubmits the bank letters and submits an unaudited financial statement for 2006 reflecting net income of \$211,465. The petitioner also submits evidence that it paid the beneficiary \$37,288 in 2006.

The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the

petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2005 or 2006. Rather, the petitioner paid the beneficiary \$37,288 in 2006, \$43,166.40 less than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. See *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). See also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2005. In that year, the petitioner shows a net income of only \$7,356 and net current assets of only \$67,525. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

The petitioner's reliance on the balances in its bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. In addition, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L considered above in determining the petitioner's net current assets. Cash is a current asset and we will not consider current assets without balancing those assets against current liabilities. Moreover, the petitioner finished 2005 with a negative balance in its bank account according to the bank statement despite listing cash on its 2005 Schedule L. In light of the discussion in this paragraph, the petitioner has not demonstrated that any other funds were available to pay the proffered wage in 2005 or early 2006 before the beneficiary began working for the petitioner.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2005 or subsequently during 2006. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.